

**STATEMENT OF EMERGENCY**  
**803 KAR 25:009E**  
**PROCEDURE FOR ADJUSTMENT OF**  
**COAL WORKERS' PNEUMOCONIOSIS CLAIMS**

(1) The Department of Workers Claims must promulgate this administrative regulation by emergency to comply with statutory mandates passed in the 2002 Legislative Session in KRS 342.315; 342.316; 342.732; 342.792; 342.794; and 342.796. This new regulation sets forth specific procedures for adjusting coal workers' pneumoconiosis claims. The new consensus process mandated by KRS 342.316 is implemented into the claims process in this new administrative regulation. The procedures for retroactive claims are set forth in this new regulation. The emergency regulation also addresses the list of "B" Readers compiled by the Commissioner for the Department of Workers Claims.

(2) This emergency regulation will be followed by an ordinary administrative regulation.

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**PAUL E. PATTON, GOVERNOR**

\_\_\_\_\_  
**DATE**

\_\_\_\_\_  
**LARRY GREATHOUSE, COMMISSIONER**  
**DEPARTMENT OF WORKERS CLAIMS**

\_\_\_\_\_  
**DATE**

1   **LABOR CABINET**

2   **Department of Workers Claims**

3   **(Emergency)**

4   **803 KAR 25:009E. Procedure for Adjustment of Coal Workers' Pneumoconiosis**  
5   **Claims.**

6       RELATES TO: KRS 342.260; 342.316; 342.732; 342.792; 342.794; and 342.796.

7       STATUTORY AUTHORITY: KRS 342.316; 342.732; and 342.260; and 342.792.

8       NECESSITY, FUNCTION, AND CONFORMITY: The Commissioner is required to  
9   promulgate administrative regulation necessary to implement the provisions of KRS Chapter  
10   342 pursuant to KRS 342.260(1); 342.316; 342.732 and 342.792. KRS 342.270(3) requires  
11   that the Commissioner promulgate administrative regulation procedures for the resolution of  
12   claims.

13       Section 1. Definitions. (1) "ALOSH" means Appalachian Lab for Occupational Safety and  
14   Health.

15       (2) " 'B' reader" is defined in KRS 342.794(3) which includes current certification with  
16   NIOSH or ALOSH.

17       (3) "Coal workers' pneumoconiosis" means a coal-related occupational pneumoconiosis  
18   which results from an accumulation of carbon and silica in the lungs from the inhalation of coal  
19   dust in the severance and processing of coal. It is also known as anthracosilicosis and

1 black lung.

2 (4) "Consensus" is defined in KRS 342.316(3)(b)3.f.

3 (5) "Director" means the Director of the Division of Workers' Compensation Funds.

4 (6) "ILO" means International Labor Organization.

5 (7) "NIOSH" means National Institute of Occupational Safety and Health.

6 Section 2. Application, Response, and Consensus Process. (1) To apply for resolution of a  
7 coal workers' pneumoconiosis claim pursuant to KRS 342.732, the applicant shall file form  
8 102-CWP with the following completed attachments:

9 (a) ILO form completed by a "B"-Reader;

10 (b) The original x-ray interpreted by the "B"-Reader whose report is attached to Form 102-  
11 CWP;

12 (c) Work History (Form 104) to include:

13 1. all past jobs performed on a full or part-time basis within twenty (20) years preceding the  
14 date of last exposure, and

15 2. all jobs in which plaintiff alleges exposure to coal dust;

16 (d) Medical History (Form 105) to include all physicians, chiropractors, osteopaths,  
17 psychiatrists, psychologists, hospitals or other medical facilities where the individual has been  
18 seen or admitted in the preceding fifteen (15) years and including beyond that date any  
19 physicians or hospitals regarding treatment for any pulmonary or respiratory condition;

20 (e) Medical Release (Form 106);

21 (f) If pulmonary dysfunction is alleged, a medical report from a physician, including

1 spirometric tests performed and tracings; and

2 (g) Social Security Release Form (Form 115).

3 (2) Within forty-five (45) days of the receipt of notice that the claim has been assigned to an  
4 Administrative Law Judge, the employer shall file the following:

5 (a) ILO form representing an interpretation of an x-ray by a "B"-reader;

6 (b) Original x-ray interpreted by the "B"-reader whose report is attached to Form 102-CWP;

7 (3) Within fifteen (15) days of the receipt of the defendant's x-ray interpretation and x-ray,  
8 the Commissioner shall issue a notice to the parties stating whether consensus has been  
9 reached.

10 (a) If there is consensus,

11 1. The Commissioner shall issue a scheduling order, and

12 2. The defendant shall have thirty (30) days from the notice of consensus to file its notice of  
13 claim acceptance or denial on a Form 111-OD.

14 (b) If consensus has not been reached, the Commissioner shall forward the xrays  
15 consecutively to three "B"-readers licensed in the State of Kentucky.

16 (4) The Commissioner shall make a determination of consensus within fifteen (15) days of  
17 receiving the three (3) "B"-reader reports.

18 (a) The Commissioner shall issue a notice of whether consensus is reached within fifteen  
19 (15) days of receiving "B"-reader reports.

20 (b) Once a determination of whether consensus is met, a scheduling order will be issued.

21 (c) Within thirty (30) days from the consensus notice issued by the Commissioner,  
22 the defendant shall file its notice of claim acceptance or denial on Form 111-OD.

23 (5) Upon the Commissioner's notification of completion of the consensus process, the  
24 plaintiff shall have thirty (30) days in which:

1 (a) to amend the claim to allege pulmonary impairment and,

2 (b) to submit a medical report supporting that allegation and pulmonary function tests. ¶

3 If pulmonary impairment is alleged as a part of the application for adjustment of a coal  
4 workers' pneumoconiosis claim or upon amendment of the claim:

5 (a) the defendant shall have the right to a pulmonary examination by a physician of its own  
6 choosing, and

7 (b) the examination shall not be conducted until completion of the consensus process.

8 (7) Within thirty (30) days of notice that consensus has been reached by the  
9 Commissioner, a party may challenge consensus by written notification to the Department and  
10 opposing parties.

11 (8) At the benefit review conference or no later than ten days prior to a scheduled hearing,  
12 whichever is later, a claimant who was age 57 or older as of the date of last exposure shall  
13 individually or through counsel inform the administrative law judge in writing of the desire to opt  
14 for a 25% permanent partial disability award instead of retraining incentive benefits, should  
15 such an award be appropriate.

16 (9) A miner who is otherwise eligible for a 25% permanent partial disability pursuant to  
17 KRS 342.732 may exercise his one-time option to choose retraining incentive benefits instead  
18 of the permanent partial disability award by filing with the administrative law judge in writing his  
19 desire to do so prior to the finality of the administrative law judge's decision. Section 3.

20 Discovery and Evidence. (1) The parties shall not submit any additional x-ray readings except  
21 what is filed in Section 1 of this administrative regulation.

22 (2) The x-ray readings submitted by the plaintiff, defendant and, if applicable, the three (3)  
23 "B" readers shall be the only x-ray readings considered as evidence by the administrative law  
24 judge.

1 (3) The three (3) "B" reader reports obtained by the Department shall be admitted into  
2 evidence without the necessity of a notice of filing by any party.

3 Section 4. Medical Reports in the Consensus Process.

4 (1) Only xray reports from "B" readers shall be admissible into evidence. (2) Medical  
5 reports submitted from the plaintiff or defendant shall include:

6 (a) a CV or medical qualifications index number for the physician, and

7 (b) a certification that the physician maintains current "B" reader status as defined in  
8 Section 1(2).

9 (3) If consensus is not reached initially with the reports of the physicians submitted by the  
10 plaintiff and defendant, the commissioner shall:

11 (a) send the x-rays consecutively to the three (3) "B" readers on a random basis, and

12 (b) insure that the "B" readers selected did not provide an initial reading for the plaintiff or  
13 defendant.

14 (4) "B" readers selected by Commissioner shall:

15 (a) submit the report on the ILO form, and

16 (b) shall return the completed report to the Department of Workers Claims with the x-rays  
17 within twenty (20) days of the date it was sent to the physician.

18 (5) If consensus is challenged by a party, the Administrative Law judge may allow timely  
19 cross-examination of a medical evaluator that participated in the consensus process at the  
20 expense of the moving party.

21 Section 5. (1) On or before July 15, 2002, the Commissioner shall identify physicians who:

22 (a) are licensed in the State of Kentucky,

23 (b) meet the definition of "B" reader which requires current NIOSH certification, and

24 (c) have agreed to participate through the Department of Workers Claims as a consensus

1 “B” reader.

2 (2) The Commissioner shall maintain the list of current “B” readers who meet the criteria  
3 stated in subsection (1) of this section.

4 Section 6. (1) This section applies to consideration of the following:

5 (a) Claims with a last exposure date between December 12, 1996 and July 14, 2002, and

6 (b) Claims in which the last exposure was prior to December 12, 1996 but was subject to a  
7 university evaluation pursuant to KRS 342.315(2) and dismissed upon a finding that the miner  
8 did not prove the presence of Coal Workers’ Pneumoconiosis.

9 (2) Any party seeking reconsideration of a claim in accordance with the provisions of KRS  
10 342.792 shall file a motion to reopen which may be on Form MTR-2.

11 (3) The motion to reopen shall be accompanied by the following:

12 (a) A current medical release Form 106 executed by the plaintiff;

13 (b) An affidavit which states:

14 1. the date of last exposure;

15 2. the claim is appropriate for consideration pursuant to the retroactive provisions of KRS  
16 342.792;

17 3. the claim was not dismissed upon grounds other than failure to meet medical eligibility  
18 standards; and

19 4. if the last exposure was prior to December 12, 1996, the prior claim was dismissed  
20 upon a finding the miner did not prove the presence of coal workers’ pneumoconiosis  
21 radiographically;

22 (c) If an award was granted under the previous provisions of KRS 342.732:

23 1. a statement of the amount awarded and benefits actually received; and

24 2. a copy of the previous award or, if settled, a copy of the Form 110 and any accompanying

documents.

(d) An updated work history (Form 104);

(e) An updated medical history (Form 105).

(4) If the requirements of subsections (1) and (3) have not been met, an administrative law judge shall issue an order summarily dismissing the motion to reopen.

(5) If a motion to reopen is filed, and an administrative law judge determines that the requirements in Subsections (1) and (3) of this section have been met, the Commissioner shall:

(a) obtain the x-ray or x-rays performed at the University medical schools pursuant to KRS 342.315 and provide it to three "B" readers licensed in the State of Kentucky who have agreed to participate on the consensus "B" reader list; and

(b) insure that a University "B" reader who offered an interpretation of the x-ray in the original claim is excluded from the consensus interpretations;

(6) Within fifteen (15) days of receipt of the three (3) "B" readers' reports, the Commissioner shall:

(a) issue notice to the parties as to whether consensus has been reached, and

(b) assign it to an administrative law judge for determination of whether a prima facie showing of entitlement to greater benefits has been made.

(7) If an administrative law judge finds a prima facie showing of entitlement to greater benefits, the Commissioner shall:

(a) issue notice scheduling the matter for a pre-hearing conference, and

(b) issue a scheduling order for the presentation of proof to the parties.

(8) Additional xray readings or pulmonary function studies shall not be submitted as evidence for consideration by the administrative law judge.



1 (9) If consensus has been reached, the parties shall have thirty (30) days to notify the  
2 Department and opposing parties of intent to challenge consensus.

3 (10) If the prior claim was settled, a statement contained in the agreement as to jurisdiction,  
4 coverage under the Act, liability of the employer, or nature and extent of disability shall not be  
5 considered by the administrative law judge as an admission against interest.

6 Section 7. Use of American Medical Association Guidelines in Coal Workers'  
7 Pneumoconiosis Cases. (1) Predicted normal values for FVC and FEV1 shall be determined  
8 in accordance with the latest edition of the American Medical Association Guideline. Age shall  
9 be determined as of the date of the evaluation. Height shall be measured while the plaintiff  
10 stands in his stocking feet and shall be rounded to the nearest centimeter. If the plaintiff's  
11 height is an odd number of centimeters, the next highest even height in centimeters shall be  
12 used.

13 (2) Formulas established by the guidelines for predicted normal FVC and FEV1 shall be  
14 applied and predicted values computed.

15 Section 8. Request for Participation by the Kentucky Coal Workers' Pneumoconiosis Fund.

16 (1) Following a final award or order approving settlement of a claim for coal workers'  
17 pneumoconiosis benefits pursuant to KRS 342.732, the employer shall file a written request for  
18 participation with the Kentucky Coal Workers' Pneumoconiosis Fund within thirty (30) days  
19 and shall serve copies of the request on all other parties.

20 (2) A written request for participation with Kentucky Coal Workers' Pneumoconiosis Fund  
21 shall be in writing and include the following documents:

22 (a) Plaintiff's application for resolution of claim;

23 (b) Defendant's notice of resistance, notice of claim denial or acceptance, and any special  
24 answer;

1 (c) All medical evidence upon which the award or settlement was based;

2 (d) The notice of consensus issued by the Commissioner, if rendered;

3 (e) Final opinion or order of an administrative law judge determining liability for benefits or  
4 settlement agreement and order approving settlement agreement.

5 (f) If an administrative law judge's award was appealed, appellate opinions shall be  
6 attached; and

7 (g) If the request for participation includes retraining incentive benefits under KRS 342.732,  
8 a certification by the requesting party that the plaintiff meets the relevant statutory criteria.

9 (3) If the request for participation is based upon the settlement of a claim, the employer shall  
10 submit a Form 110-CWP settlement agreement that represents liability exclusively for coal  
11 workers pneumoconiosis benefits, and does not include any sums for other claims which the  
12 plaintiff may have against the employer.

13 (4) In claims arising under KRS 342.792, if the employer fails to submit a request for  
14 participation within 30 days of the final award or order approving settlement, the plaintiff or an  
15 administrative law judge may file a written request for participation with the Kentucky Coal  
16 Workers' Pneumoconiosis Fund within 60 days of the final award or order approving  
17 settlement,

18 (5) Within thirty (30) days following receipt of a completed request for participation, the  
19 director of the Kentucky Coal Workers' Pneumoconiosis Fund shall notify the employer and all  
20 other parties of acceptance or denial of the request.

21 (6) A denial shall be in writing and based upon any of the following findings by the director:

22 (a) Failure to file a written request for participation within the time limits specified in this  
23 administrative regulation without good cause;

24 (b) The employer failed to defend the claim;

1 (c) The employer entered into a settlement agreement not supported by the medical  
2 evidence, or which includes sums for claims other than coal workers' pneumoconiosis or which  
3 was procured by fraud or mistake; or

4 (d) The award or settlement was for retraining incentive benefits and the request for  
5 participation did not include the training or education certification required by this  
6 administrative regulation.

7 (7) Denial of a request for participation may be appealed by any party to an administrative  
8 law judge within thirty (30) days following receipt of the denial.

9 (8) The administrative law judge shall: (a) determine if the denial was arbitrary, capricious,  
10 or in excess of the statutory authority of the director, and

11 (b) not reexamine the weight assigned to evidence by an administrative law judge in an  
12 award.

13 (9) Except in claims under KRS 342.792, the employer shall promptly commence payment  
14 on all of the liability pursuant to the award or order and shall continue until the liability of the  
15 Kentucky Coal Workers' Pneumoconiosis Fund is established.

16 (a) This duty of prompt payment shall continue during pendency of an appeal from denial of  
17 a request for participation.

18 (b) In claims arising from KRS 342.792, the Kentucky Coal Workers' Pneumoconiosis Fund  
19 shall promptly commence payment upon its acceptance of the claim.

20 (10)(a) Except in claims under KRS 342.792, upon an appeal from the denial of a request  
21 for participation, if the Kentucky Coal Workers' Pneumoconiosis Fund does not prevail, it shall  
22 reimburse the employer for its proportionate share of the liability with interest accrued from the  
23 date of denial.

24 (b) In an appeal of a denial in a claim arising under KRS 342.792, in which the Kentucky

Coal Workers' Pneumoconiosis Fund does not prevail, the fund shall commence payment pursuant to the opinion and award or order approving settlement with interest accrued from the date of the denial. All interest shall be paid at the rate established in KRS 342.040.

Section 10. Any procedures not specifically set forth in this administrative regulation shall be governed by the guidelines set forth in 803 KAR 25:010, Procedure for adjustments of claims.

Section 11. Incorporation by Reference.

(1) Form 102-CWP, Application for Resolution of Coal Workers' Pneumoconiosis Claim (July 2002 Edition);

(2) Form 104, Plaintiff's Employment History (Jan. 1, 1997 Edition);

(3) Form 105, Plaintiff's Chronological Medical History (Jan. 1, 1997);

(4) Form 106, Medical Waiver and Consent (Jan. 1, 1997);

(5) Form 115, Social Security Release (Jan. 1, 1997 Edition);

(6) ILO Form;

(7) Form 111-OD, Notice of Claim Denial or Acceptance (Jan. 1997 Edition)

(8) Form 110-CWP, Agreement As To Compensation and Order Approving Settlement (July 2002 Edition);

(9) Form MTR-2, Motion to Reopen KRS 342.732 Benefits (July 2002, Edition);